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**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/782,151
Filing Date: February 14, 2001
Appellant(s): FRAZIER, RALPH E.

Peter H. Priest
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed on October 30, 2006 appealing from the Office action mailed on May 31, 2006.

(1) Real Party in Interest

A statement identifying by name the real party in interest is contained in the brief.

(2) Related Appeals and Interferences

The examiner is not aware of any related appeals, interferences, or judicial proceedings which will directly affect or be directly affected by or have a bearing on the Board's decision in the pending appeal.

(3) Status of Claims

The statement of the status of claims contained in the brief is correct.

(4) Status of Amendments After Final

The appellant's statement of the status of amendments after final rejection contained in the brief is correct. The amendment after final rejection filed on October 30, 2006 has been entered.

(5) Summary of Claimed Subject Matter

The summary of claimed subject matter contained in the brief is correct.

(6) Grounds of Rejection to be Reviewed on Appeal

The appellant's statement of the grounds of rejection to be reviewed on appeal is correct.

(7) Claims Appendix

The copy of the appealed claims contained in the Appendix to the brief is correct.

(8) Evidence Relied Upon

6,049,798	BISHOP et al.	4-2000
5,590,056	BARRITZ	12-1996
5,247,675	FARRELL et al.	9-1993
5,870,604	YAMAGISHI	2-1999
6,795,809	O'BRIEN et al.	9-2004

(9) Grounds of Rejection

The following ground(s) of rejection, set forth in the Office action mailed on May 31, 2006 and incorporated herein, are applicable to the appealed claims:

- Claims 1 and 3-17 stand finally rejected under 35 U.S.C. 103(a) as being unpatentable over U.S. Patent No. 6,049,798 to Bishop et al. ("Bishop") in view of U.S. Patent No. 5,590,056 to Barritz ("Barritz") in view of U.S. Patent No. 5,247,675 to Farrell et al. ("Farrell") in view of U.S. Patent No. 5,870,604 to Yamagishi ("Yamagishi").

Claim 1

Bishop discloses a method of capturing operating software scheduling information during execution of operating software (see, for example, the abstract, which shows capturing internal resource information such as CPU and memory availability or utilization, i.e. scheduling information, in real-time, i.e. during execution of the operating software) and recording said operating software scheduling information from within the operating software (see, for example, column 11, lines 1-10, which shows that the scheduling information is recorded from within the operating software), the method comprising the steps of:

(a) compiling operating software scheduling information capture software which is an integral part of the operating system (see, for example, column 11, lines 1-4, which shows a service of the operating system, inherently compiled, that is used for capturing event traces of process activity, i.e. scheduling information).

Although Bishop discloses recording the data for a certain amount of time in order to provide past records, i.e. a history of events (see, for example, column 22, lines 18-22), and discloses identifying each task by process ID and process name (see, for example, FIG. 13A), Bishop does not expressly disclose the limitation wherein the operating software scheduling information capture software records a history of the operating software events as they occur, information related to the history being organized and stored as operating software program scheduling information relating to interactions between the operating system software and each of the programs and tasks managed by the operating system software.

However, Barritz discloses monitoring events as they occur and recording an event history log (see, for example, FIG. 5 and column 6, lines 54-57), in which the recorded information comprises job scheduling information for each module or task managed by the scheduler, i.e. the operating system software (see, for example, column 6, lines 58-64), so as to identify software usage patterns (see, for example, column 2, line 63 to column 3, line 4).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to supplement the capture system of Bishop with the event history features taught by Barritz, for the purpose of identifying software usage patterns.

Although Bishop discloses monitoring and capturing the information to improve the efficiency of a computer system (see, for example, column 3, lines 12-33), Bishop does not expressly disclose the limitation wherein the scheduling information includes indications of relative priorities of programs and tasks.

However, Farrell discloses scheduling information that indicates the relative priorities of threads or tasks (see, for example, thread state descriptor 19 in FIG. 2, and column 4, line 62 to column 5, line 12), which is used to optimize program execution (see, for example, column 2, lines 19-24).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to supplement the information captured by Bishop with the relative priorities of programs and tasks, such as taught by Farrell, in order to further improve execution efficiency.

Bishop further discloses the limitation wherein the scheduling information includes indications of transfers of control from lower priority to higher priority tasks (see, for example, FIG. 13A, which shows trace records for process switches, i.e. transfers of control among tasks, and column 10, lines 62-67, which shows that the tasks have lower and higher priority levels).

Although Bishop discloses monitoring and capturing the information to improve the efficiency of a computer system (see, for example, column 3, lines 12-33), Bishop does not expressly disclose the limitation wherein the scheduling information includes identification of tasks waiting for execution at the occurrence of each software event.

However, Yamagishi discloses scheduling information that identifies the number of jobs or tasks waiting for execution (see, for example, operation status table 9 and heading 92 in FIG. 3). A CPU monitor captures the information from a job scheduler (see, for example, column 3, lines 59-65) to distribute the load among processors, thereby improving efficiency (see, for example, column 2, lines 36-39).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to supplement the information captured by Bishop with the tasks waiting for execution, such as taught by Yamagishi, in order to further improve execution efficiency.

Bishop further discloses the steps of:

(b) invoking operating software scheduling information capture (see, for example, column 20, line 55 to column 21, line 4, which shows a procedure for invoking the capture of the data); and

(c) recording operating software scheduling information while the operating software is executing, for relatively long duration storage in order to permit review of the scheduling information by a user (see, for example, column 3, lines 12-33, which shows recording the scheduling information in real time, i.e. while the operating software is executing, and column 22, lines 18-22, which further shows recording the data for a relatively long duration for review of past records by a user).

Barritz further discloses the limitation wherein the duration of storage is sufficient to allow data collected during an operating session to be retrieved and used after termination of the session (see, for example, column 10, lines 28-44, which shows that the information is recorded to a log for storage, and column 8, lines 43-63, which shows that the information is later retrieved from the log after one or more operating sessions to produce statistical reports).

Claim 3

Bishop further discloses the limitation wherein the operating software scheduling information recorded includes information updated or maintained by the operating software in relation to the scheduling of a program (see, for example, FIG. 13A, which shows trace records that include execution time and interrupt time, information maintained by the operating system in relation to scheduling).

Claim 4

Bishop in view of Barritz, Farrell and Yamagishi further discloses the limitation wherein the operating software scheduling information recorded includes task identification, task priority, and task run-time length (see, for example, Bishop, FIG. 13A, which shows trace records that include the process ID, i.e. task identification, and the execution time, i.e. run-time length; also see, for example, Farrell, FIG. 2, which shows a thread state descriptor that includes the thread or task priority).

Claim 5

Bishop in view of Barritz, Farrell and Yamagishi further discloses the limitation wherein the operating software scheduling information includes a task waiting count (see, for example, Yamagishi, FIG. 3, which shows an operation status table that includes the number of jobs waiting for execution, i.e. a task waiting count).

Claim 6

Bishop further discloses the limitation wherein the operating software scheduling information is recorded to a ledger (see, for example, column 20, lines 36-37 and 50-52, which shows that the data is initially recorded to a buffer or ledger).

Claim 7

Bishop further discloses the limitation wherein the ledger is at least one of a circular or fixed length ledger (see, for example, column 21, lines 23-26, which shows that data is discarded from the pipe if it is not read quickly enough, i.e. because the buffer is a circular ledger having a fixed length).

Claim 8

Bishop further discloses the limitation wherein the scheduling information includes at least one of the number of program schedules, program preempts, and interrupts (see, for example, column 14, lines 14-15 and 35-45, which shows that interrupts are recorded).

Claim 9

Bishop further discloses the limitation wherein the scheduling information includes at least one of the highest priority attained, program identity, and length of run-time (see, for example, column 21, lines 49-52, which shows that the process name, i.e. the program identity, is included in the captured scheduling information).

Claim 10

Bishop further discloses the limitation wherein the scheduling information includes at least one of the lowest priority attained, program identity, and length of run-time (see, for example, column 21, lines 49-52, which shows that the process name, i.e. the program identity, is included in the captured scheduling information).

Claim 11

Bishop further discloses the limitation wherein the scheduling information includes at least one of the number of times in the idle loop and length of run-time (see, for example, FIG. 13A, which shows trace records that include the execution time, i.e. the length of run-time).

Claim 12

Bishop further discloses the limitation wherein the scheduling information includes a sequential record of at least one of scheduled programs, priorities, and events (see, for example, column 15, lines 54-64, which shows that events are matched with timing information to compose a sequential record of events).

Claim 13

Bishop in view of Barritz, Farrell and Yamagishi further discloses the limitation wherein the scheduling information includes at least one of the number and identity of programs waiting to run (see, for example, Yamagishi, FIG.. 3, which shows an operation status table that includes the number of jobs waiting to run).

Claim 14

Bishop further discloses the limitation wherein the operating software scheduling information capture is invoked on an event occurrence (see, for example, column 14, lines 14-15 and 55-60, which shows that events such as a mode switch can invoke the capture of scheduling information).

Claim 15

The limitations recited in the claim are analogous to those of claim 1 (see the rejection of claim 1 above).

Claim 16

Bishop further discloses the limitation wherein said operating software scheduling information capture software is not resident on an external device (see, for example, column 4, lines 32-34, which shows that the software can be internal to the system, and column 22, lines 59-63, which shows that external hardware is not needed).

Claim 17

Bishop further discloses the limitation wherein said operating software scheduling information capture software is not a separate task scheduled by an operating software scheduler (see, for example, column 11, lines 1-10 and 30-35, which shows that the information capture is performed by a device driver, i.e. not by a separate task scheduled by a operating software scheduler).

- Claim 2 stands finally rejected under 35 U.S.C. 103(a) as being unpatentable over Bishop in view of Barritz in view of Farrell in view of Yamagishi, as applied to claim 1 above, and further in view of U.S. Patent No. 6,795,809 to O'Brien et al. ("O'Brien").

Claim 2

Bishop in view of Barritz, Farrell and Yamagishi further discloses selecting the information to be recorded by the operating software scheduling information capture software (see, for example, Barritz, column 10, lines 45-49), but Bishop in view of Barritz, Farrell and Yamagishi does not expressly disclose:

(a) scanning a specific bar code tag sequence with a retail bar code scanner; and

(b) selecting the information to be recorded by the operating software scheduling information capture software based upon the specific bar code tag sequence.

However, O'Brien discloses scanning a specific bar code tag sequence with a retail bar code scanner (see, for example, column 2, lines 27-35) and selecting information to be recorded based upon the specific bar code tag sequence (see, for example, column 12, lines 40-53).

It would have been obvious to one of ordinary skill in the art at the time the invention was made to supplement the system of Bishop, Barritz, Farrell and Yamagishi with the bar code scanning features of O'Brien. Incorporating a retail store bar code scanner into the system of Bishop, Barritz, Farrell and Yamagishi in such a manner would enable the selection of information to be recorded by the operating software scheduling information capture software without manual data entry, saving time and effort and reducing errors.

- Claims 18-20 stand finally rejected under 35 U.S.C. 103(a) as being unpatentable over Bishop in view of Barritz in view of Farrell in view of Yamagishi in view of O'Brien.

Claim 18

The limitations recited in the claim are analogous to those of claim 2 (see the rejections of claims 1 and 2 above). Bishop further discloses a processor for receiving and transmitting data (see, for example, CPU 190 in FIG. 14) and a memory coupled to the processor (see, for example, RAM 193 in FIG. 14), the memory storing instructions to be executed by the processor.

Claim 19

Bishop further discloses the limitation wherein said operating software scheduling information capture software is internally processed on said processor (see, for example, column 4, lines 32-34, which shows that the software can be internal to the system).

Claim 20

Bishop further discloses the limitation wherein said operating software scheduling information capture software is not a separate task scheduled by an operating software scheduler (see, for example, column 11, lines 1-10 and 30-35, which shows that the information capture is performed by a device driver, i.e. not by a separate task scheduled by an operating software scheduler).

(10) Response to Argument

A. Rejection under 35 U.S.C. § 103 over Bishop, Barritz, Farrell and Yamagishi (brief, page 6)

At the outset, the examiner respectfully submits that the Office action set forth a *prima facie* case of obviousness. It is noted that Appellant's arguments against the references individually (brief, pages 7-15) are directed to features for which the individual references are not expressly relied upon. Furthermore, it is noted that one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981), and *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

<u>Claim 1</u> (brief, page 6)

Appellant contends that the scheduling information of Bishop "does not include a history of operating software events with information relating to the history being organized and stored as operating software program scheduling information relating to interactions between the operating system software and each of the programs and tasks managed by the operating system software" (brief, page 8).

However, it is noted that as set forth in the Office action (pages 4-5), it is the Barritz reference that is relied upon for this feature, not Bishop. Barritz teaches recording a history of events in a recorded information log (see, for example, FIG. 5 and column 6, lines 54-57). The information relating to the history is organized and stored as job scheduling information relating to interactions between the scheduler (i.e., the operating system software) and each of the modules or tasks that it manages (see, for example, column 6, lines 58-64).

Appellant contends that Bishop "does not indicate that the viewing period remains open past the termination of an operating session, and does not indicate that the collected information is retrievable past the termination of an operating session" (brief, page 8).

Again, it is noted that as set forth in the Office action (page 7), it is the Barritz reference that is relied upon for the feature of "duration of storage being sufficient to allow data collected during an operating session to be retrieved and used after termination of the session," not Bishop. Barritz teaches that the recorded information log is stored in persistent storage (see, for example, column 10, lines 28-44). The duration of storage is sufficient to allow the retrieval of the recorded information after the termination of one or more operating sessions in order to generate reports for review (see, for example, column 8, lines 43-63).

Appellant contends, "Neither Bishop, Barritz nor a combination of Bishop and Barritz teaches or makes obvious" that "a history of operating system events organized and stored as scheduling information includes indications of relative priorities of programs and tasks, indications of transfers of control from lower priority to higher priority tasks and identification of tasks waiting for execution at the occurrence of each operating software event" (brief, page 9). Similarly, Appellant contends that Bishop "does not employ indications of relative priorities of programs and tasks" (brief, page 9), and that the scheduling information of Barritz "does not include information relating to relative priorities of programs and tasks, transfers of control from lower priority to higher priority tasks and tasks waiting for execution at the occurrence of each operating software event" (brief, page 10).

However, it is noted that as set forth in the Office action (pages 5-6), it is not Appellant's proposed combination, but rather the Farrell, Bishop and Yamagishi references that are relied upon for these features. Here, Farrell teaches scheduling information that indicates the relative priorities of threads or tasks (see, for example, thread state descriptor 19 in FIG. 2, and column 4, line 62 to column 5, line 12). Bishop teaches that the scheduling information indicates process switches (i.e., transfers of control) to and from tasks (see, for example, FIG. 13A) with lower and higher priority levels (see, for example, column 10, lines 62-67). Finally, Yamagishi teaches scheduling information that identifies the number of jobs or tasks waiting for execution (see, for example, operation status table 9 and heading 92 in FIG. 3).

Appellant contends, "Bishop and Barritz do not address the same concerns, and the addition of Barritz to Bishop would not contribute to the information provided by Bishop" (brief, page 10).

However, the examiner does not agree with Appellant's conclusions. Bishop is directed to monitoring and capturing information related to system resource utilization (see, for example, the abstract). Likewise, Barritz is directed to monitoring and recording information related to computer program usage (see, for example, the abstract). The references are clearly analogous. The teachings of Bishop provide "accurate representations of the operations of the data processing system" that enable one to "identify, isolate, and fine-tune the data processing system to improve the overall efficiency of the system" (column 3, lines 28-33). Likewise, the teachings of Barritz provide reports (see, for example, column 8, lines 43-63) that enable one to "identify patterns of usage" in the system (column 3, lines 4-8). Certainly, adding Barritz to Bishop would provide more information with which to fine-tune the system. Just as the information of Bishop is "captured and presented at a process level" (column 4, lines 36-37), the information recorded in Barritz would provide further insight into the processes themselves (see, for example, column 6, lines 58-64). In addition, one of ordinary skill in the art would recognize that a user of Bishop could make better-informed decisions with a longer history of information. The long-term storage of Barritz provides as much.

Appellant contends that Farrell "does not teach the relatively long term storage of scheduling information to permit review by a user, with the duration of storage being sufficient to allow data collected during an operating session to be retrieved and used after termination of the session" (brief, page 11), and similarly that Yamagishi "does not collect data identifying the tasks awaiting execution at each particular software event for relatively long duration storage in order to permit review by a user" (brief, page 11).

Again, it is noted that as set forth in the Office action (page 7), and as noted above, it is the Barritz reference that is relied upon for this feature, not Farrell or Yamagishi. Barritz teaches that the recorded information log is stored in persistent storage (see, for example, column 10, lines 28-44). The duration of storage is sufficient to allow the retrieval of the recorded information after the termination of one or more operating sessions in order to generate reports for review (see, for example, column 8, lines 43-63). Furthermore, as set forth in the Office action (page 6), Bishop also teaches relatively long term storage of scheduling information to permit user review (see, for example, column 22, lines 18-22).

Appellant contends, "Combining the references in the manner suggested would not be obvious, and would not achieve the invention claimed by claim 1" (brief, page 12).

However, the examiner does not agree with Appellant's conclusions. Appellant acknowledges that Bishop, Farrell and Yamagishi are analogous, but contends that Barritz "collects and preserves a different category of information from that collected by Bishop, Farrell and Yamagishi" (brief, page 12). To the contrary, the information recorded in Barritz is reasonably interpreted as "operating software scheduling information" as recited in the claims, akin to the scheduling information collected in the Bishop, Farrell and Yamagishi references.

Specifically, as noted above, the information of Barritz includes information related to job scheduling (see, for example, column 6, lines 58-64).

Moreover, one of ordinary skill in the art would have been motivated to combine the teachings of the references. Again, the information captured in Bishop enables one to "identify, isolate, and fine-tune the data processing system to improve the overall efficiency of the system" (column 3, lines 28-33). The teachings of Barritz suggest storing the information for a long duration, and further enable one to "identify patterns of usage" in the system (column 3, lines 4-8). The teachings of Farrell and Yamagishi, in addition, suggest collecting other items of information with which to fine-tune the system and improve the overall efficiency of the system. Farrell teaches scheduling information that directly or indirectly "optimizes the execution of threads" (column 2, lines 19-24). Likewise, Yamagishi teaches scheduling information that enables the "effective utilization of the processors" in the system (column 2, lines 38-39). Thus, as set forth in the Office action, the claimed subject matter would have been obvious to a person having ordinary skill in the art.

<u>Claim 15</u> (brief, page 12)

In response to Appellant's argument (brief, page 13), the examiner refers to the discussion above.

<u>Claims 3-17</u> (brief, page 13)

In response to Appellant's argument (brief, page 13), the examiner refers to the discussion above.

B. Rejection under 35 U.S.C. § 103 over Bishop, Barritz, Farrell and Yamagishi, and further in view of O'Brien (brief, page 14)

Claim 2 (brief, page 14)

In response to Appellant's argument (brief, page 14), the examiner refers to the discussion above.

Claim 18 (brief, page 14)

In response to Appellant's argument (brief, pages 14-15), the examiner refers to the discussion above.

Claims 19 and 20 (brief, page 15)

In response to Appellant's argument (brief, page 15), the examiner refers to the discussion above.

C. The Examiner's Findings of Obviousness Are Also Contrary to the Law of the Federal Circuit (brief, page 15)

Appellant states, "The references cited by the Examiner, if anything, teach away from the present invention," and similarly, "It is only in hindsight, after seeing the claimed invention, that the Examiner could combine the references as the Examiner has done" (brief, page 15). Appellant further states, "The Examiner's rejection suggests that the Examiner did not consider and appreciate the claims as a whole," and finally, "Even with the claims as a guide, however, the Examiner did not recreate the claimed invention" (brief, page 17).

However, it is noted that Appellant's statements amount to mere assertions. The examiner respectfully submits that as demonstrated above, the combination of references teaches or suggests all of the claim limitations, and likewise that there is a teaching, suggestion or motivation to combine the teachings of the references found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. Moreover, Appellant's statements do not prove that the actual reasoning set forth in combining the references is somehow illogical or unreasonable.

To reiterate, Bishop is directed to monitoring and capturing information related to system resource utilization (see, for example, the abstract) so as to "identify, isolate, and fine-tune the data processing system to improve the overall efficiency of the system" (column 3, lines 28-33). Barritz is similarly directed to monitoring and recording information related to computer program usage (see, for example, the abstract) so as to, for example, "identify patterns of usage" in the system (column 3, lines 4-8). To this end, Barritz teaches recording a history of events (see, for example, column 6, lines 54-57) and storing the information for a long duration (see, for example, column 10, lines 28-44), sufficient to allow the retrieval of the recorded information after the termination of one or more operating sessions (see, for example, column 8, lines 43-63). The information recorded in Barritz provides insight into the scheduling of jobs or processes in the system (see, for example, column 6, lines 58-64). Likewise, capturing and presenting information "at a process level" is another goal of Bishop (column 4, lines 36-37). One of ordinary skill in the art would have been motivated to incorporate the teachings of Barritz into

Bishop so as to enable a user of Bishop to "identify patterns of usage," and thus make better-informed decisions in fine-tuning the system to improve overall efficiency.

Similarly, Farrell and Yamagishi would provide Bishop with more information with which to fine-tune the system. Farrell teaches scheduling information that indicates the relative priorities of threads or tasks (see, for example, thread state descriptor 19 in FIG. 2, and column 4, line 62 to column 5, line 12), which directly or indirectly "optimizes the execution of threads" (column 2, lines 19-24). Yamagishi teaches scheduling information that identifies the number of jobs or tasks waiting for execution (see, for example, operation status table 9 and heading 92 in FIG. 3), which enables the "effective utilization of the processors" in the system (column 2, lines 38-39). One of ordinary skill in the art would have been motivated to incorporate the teachings of Farrell and Yamagishi into Bishop so as to provide the additional information and thus enable a user of Bishop to further optimize and improve execution efficiency.

In closing, the test for obviousness is not whether the features of a secondary reference may be bodily incorporated into the structure of the primary reference; nor is it that the claimed invention must be expressly suggested in any one or all of the references. Rather, the test is what the combined teachings of the references would have suggested to those of ordinary skill in the art. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981). Likewise, it must be recognized that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971). In addition, it is noted that an artisan is likely to extract more than a layman from reading a reference. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443, 1445 (CAFC 1992).

Furthermore, notwithstanding Appellant's statement that the claims "disclose a unique combination with many features and advantages not shown in the art" (brief, page 17), the fact that applicant has recognized another advantage which would flow naturally from following the suggestion of the prior art cannot be the basis for patentability when the differences would otherwise be obvious. See *Ex parte Obiaya*, 227 USPQ 58, 60 (Bd. Pat. App. & Inter. 1985).

(11) Related Proceeding(s) Appendix

No decision rendered by a court or the Board is identified by the examiner in the Related Appeals and Interferences section of this examiner's answer.

For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,

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MY

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